

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ANTWINE HACKNEY, }  
Plaintiff, } Case No. 2:12-cv-01786-JCM-CWH  
vs. } **ORDER**  
ELLIS ISLAND CASINO & BREWERY, }  
Defendant. }

This matter is before the Court on Plaintiff's Application to Proceed in Forma Pauperis (#1), filed October 11, 2012.

## DISCUSSION

### I. *In Forma Pauperis* Application

Plaintiff submitted a financial affidavit along with his application and complaint as required by 28 U.S.C. § 1915(a). After reviewing the financial affidavit pursuant to 28 U.S.C. § 1915(a), the Court finds that Plaintiff is unable to pre-pay the filing fee. As a result, Plaintiff's request to proceed *in forma pauperis* is granted.

## **II. Screening the Complaint**

Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a complaint pursuant to § 1915(a). Specifically, federal courts are given the authority dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint may be dismissed as frivolous if it is premised on a nonexistent legal interest or delusional factual scenario. *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989). Moreover, “a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or wholly incredible, whether or not there are judicially

1 noticeable facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

2 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a  
 3 complaint for failure to state a claim upon which relief can be granted. A complaint should be  
 4 dismissed under Rule 12(b)(6) “if it appears beyond a doubt that the plaintiff can prove no set of  
 5 facts in support of his claims that would entitle him to relief.” *Buckey v. Los Angeles*, 968 F.2d  
 6 791, 794 (9<sup>th</sup> Cir. 1992). Review under Rule 12(b)(6) is essentially a ruling on a question of law.  
 7 See *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

8 A properly pled complaint must provide a short and plain statement of the claim showing  
 9 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*,  
 10 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations, it  
 11 demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause  
 12 of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v. Allain*, 478 U.S. 265,  
 13 286 (1986)). The court must accept as true all well-pled factual allegations contained in the  
 14 complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 556 U.S. at 679.  
 15 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do  
 16 not suffice. *Id.* at 678. Allegations of a *pro se* complaint are held to less stringent standards than  
 17 formal pleading drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curium).  
 18 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to  
 19 amend the complaint with directions as to curing its deficiencies, unless it is clear from the face  
 20 of the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*  
 21 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22       **A.     Federal Question Jurisdiction**

23       As a general matter, federal courts are courts of limited jurisdiction and possess only that  
 24 power authorized by the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004).  
 25 Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil  
 26 actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises  
 27 under’ federal law either where federal law creates the cause of action or ‘where the vindication  
 28 of a right under state law necessarily turn[s] on some construction of federal law.’” *Republican*

1       *Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting *Franchise Tax Bd.*  
 2       *v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983)). The presence or absence of  
 3       federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar, Inc.*  
 4       *v. Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, “federal  
 5       jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly  
 6       pleaded complaint.” *Id.* Here, Plaintiff alleges civil rights violations under 42 U.S.C. § 1983. A  
 7       claim under this statute invokes the Court’s federal jurisdiction. However, because the Court  
 8       finds that Plaintiff failed to properly bring a claim under Section 1983 (see discussion below),  
 9       federal question jurisdiction does not exist at this time.

#### 10       **B.      Diversity Jurisdiction**

11       Pursuant to 28 U.S.C. § 1332, federal district courts have original jurisdiction over civil  
 12       actions in diversity cases “where the matter in controversy exceeds the sum or value of \$75,000”  
 13       and where the matter is between “citizens of different states.” Plaintiff asserts damages of  
 14       \$300,000.00 in her complaint. However, Plaintiff states that he is a citizen of Nevada, but does  
 15       not provide the citizenship of Defendants. The diversity jurisdiction statute requires that to bring  
 16       a diversity case in federal court against multiple defendants, each plaintiff must be diverse from  
 17       each defendant. *Wisconsin Dep’t of Corrections v. Schacht*, 524 U.S. 381, 388 (1998). Plaintiff  
 18       and the Defendants appear to be Nevada citizens so there is no diversity jurisdiction in this case.

#### 19       **C.      Section 1983 Claim**

20       It appears as though Plaintiff is alleging claims for racial and age discrimination under 42  
 21       U.S.C. § 1983. Plaintiff attached a Notice of Suit Rights letter from the Equal Employment  
 22       Opportunity Commission dated July 12, 2012. This letter informed Plaintiff that his lawsuit  
 23       must to be filed within 90 days of his receipt of the letter. The Court notes that Plaintiff filed this  
 24       action on October 11, 2012, which is one day late based on the July 12, 2012 mailing date. As  
 25       the Court has no evidence of a postmark with a later date, this suit is untimely.

26       Additionally, to state a claim under Section 1983, a plaintiff must plead that the named  
 27       defendant (1) acted “under color of state law” and (2) “deprived the plaintiff of rights secured by  
 28       the Constitution or federal statutes.” *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986); *see*

1       also *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185  
 2 (9th Cir. 2006). Persons acting under color of state law typically include officials who in some  
 3 capacity represent either the state, city or county government. See *Monroe v. Pape*, 365 U.S. 167  
 4 (1961), partially overruled on other grounds by *Monell v. Department of Social Services of City*  
 5 *of New York*, 436 U.S. 658, 663 (1978). Plaintiff's complaint alleges that he was subjected to  
 6 racial slurs every day for several years until being fired one month after filing a report with his  
 7 supervisor. Plaintiff failed to state the names of the people who used racial slurs. However, the  
 8 Court notes that Ellis Island Casino and Brewery appears to be a private party. Generally, private  
 9 parties do not act under color of state law. See *Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir.  
 10 2003). Therefore, the Court finds that Plaintiff failed to provide sufficient facts to state a claim  
 11 for relief under Section 1983.

12       Plaintiff may have intended to file a claim for race discrimination in violation of Title VII  
 13 of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and age discrimination in  
 14 violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et*  
 15 *seq.* However, he did not cite either of these statutes. Also, in order to prove a prima facie case  
 16 of discrimination in violation of Title VII, Plaintiff must establish: (a) he belonged to a protected  
 17 class; (b) he was qualified for his job; (c) he was subjected to adverse employment action; and  
 18 (d) similarly situated employees not in his protected class received more favorable treatment.  
 19 *Moran v. Selig*, 447 F.3d 748, 753 (9<sup>th</sup> Cir. 2006) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810,  
 20 818 (9<sup>th</sup> Cir. 2002)). Plaintiff did not provide the dates of the alleged incidents of racial  
 21 discrimination, state his race, how he was qualified for his job, and describe any similarly  
 22 situated employees. Similarly, Plaintiff did not provide any facts pertaining to his age  
 23 discrimination claim. Therefore, the Court finds that Plaintiff failed to provide sufficient facts to  
 24 state a claim for relief under Title VII or the ADEA.

25       In conclusion, absent sufficient factual allegations to correct the above-noted subject-  
 26 matter jurisdiction deficiencies, Plaintiff's claims cannot survive. As Plaintiff is proceeding *pro*  
 27 *se*, the Court will provide Plaintiff with thirty days to amend the complaint.

28       Based on the foregoing and good cause appearing therefore,

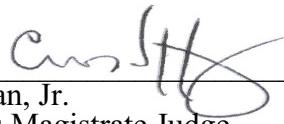
1           **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed In Forma Pauperis  
2 (#1) is **granted**. Plaintiff shall not be required to pre-pay the full filing fee of three hundred fifty  
3 dollars (\$350.00).

4           **IT IS FURTHER ORDERED** that Plaintiff is permitted to maintain this action to its  
5 conclusion without the necessity of prepaying any additional fees or costs or giving security  
6 therefor. This Order granting leave to proceed *in forma pauperis* shall not extend to the issuance  
7 of subpoenas at government expense.

8           **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the Complaint  
9 (#1-1).

10          **IT IS FURTHER ORDERED** that the Complaint is **dismissed** without prejudice for  
11 failure to state a claim upon which relief can be granted, with leave to amend. Plaintiff will have  
12 **thirty (30)** days from the date that this Order is entered to file an Amended Complaint, if he  
13 believes he can correct the noted deficiencies. Failure to comply with this Order may result in  
14 the Court recommending that this action be dismissed.

15          DATED this 15th day of October, 2012.

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C.W. Hoffman, Jr.  
United States Magistrate Judge